DISTRICT OF COLUMBIA
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A.B. Appellant/Claimant v. TRANSPORTATION CO. Appellee/Employer	Case No.: 2012-DOES-00857

FINAL ORDER

I. INTRODUCTION

A. Parties: A.B. ("Claimant") and Transportation Co. ("Employer"). D.S. represented Employer.

B. Relevant Statutory Provisions: District of Columbia Unemployment Compensation Act ("Act"), 7 District of Columbia Municipal Regulations ("DCMR") 312, D.C. Official Code §§ 51-110 (reasons for disqualification) and 51-111(b) (timeliness of appeal).

C. Issue Presented: Whether Claimant is disqualified from receiving unemployment benefits when he was terminated for his involvement in four preventable accidents during his employment as a bus driver.

D. Date and Time of Evidentiary Hearing: June 6, 2012, at 1:30 p.m.

II. FINDINGS OF FACT

A. Timeliness of Appeal

On May 18, 2012, the District of Columbia Department of Employment Services ("DOES") mailed the Claims Examiner's Determination ("Determination") to parties. Court Exhibit 300. On May 22, 2012, Claimant filed an appeal, requesting a hearing. Court Exhibit 301.

B. Separation from Employment

Employer is a transportation agency that provides services throughout the Washington, DC metropolitan area, including bus service. Employer's headquarters is located in the District of Columbia. Employer has a "Guide to Determining the Preventable Accidents" ("GUIDE"). Exhibit 200. The Guide establishes what disciplinary action can be taken against employees who are involved in preventable accidents. *Id.* A preventable accident occurs when an employee does not follow the rules and guidelines as stated within the Guide in regards to preventing accidents. There are two types of preventable accidents: (1) minor and (2) major. *Id.* The Guide also puts Bus Operators on notice that they will be discharged after four preventable minor accidents within a 365 day period. *Id.*

On April 4, 2011, Claimant was in an accident where Employer found that he "misjudged his clearance and failed to make proper observations before changing lanes." Exhibit 201. Employer rated the accident as "Preventable Minor" and issued Claimant a written reprimand. *Id.*

On May 13, 2011, Claimant was again found by Employer to have misjudged him clearance and struck a pole while driving. *Id.* The incident was Claimant's second preventable

accident within a 365 days period. Employer rated the accident as "Preventable Minor" and Claimant received a two (2) day suspension and one (1) day paid remedial training. *Id.*

On October 6, 2011, Claimant was involved in an accident where Employer determined he "failed to maintain safe following and stopping distance in traffic, and use proper observation." *Id.* This was Claimant's third preventable accident within a 365 day period and was rated "Preventable Major." *Id.* Claimant received a thirteen (13) day suspension, final warning and two (2) days of paid training.

On October 25, 2011, Claimant received a Corrective Interview where he was told the importance of "paying close attention to and operating in compliance with the Standard Operating Procedures." *Id.* Employer warned Claimant that if Claimant was involved in another preventable accident before April 4, 2012, he would be dismissed. *Id.*

On March 30, 2012, Claimant was involved in another accident and Employer concluded that he "misjudged his clearance while passing a stopped vehicle." *Id.* On April 17, 2012, Employer terminated Claimant from his position as Bus Operator for having four preventable accidents within a 365 day period. *Id.* Nothing in Employer's investigations of Claimant's accidents led Employer to believe Claimant had engaged in willful behavior that contributed to the accidents.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Timeliness of Appeal

Any party may file an appeal from a Determination within 15 calendar days after the mailing of the Determination to the party's last known address of, in the absence of such mailing, within 15 calendar days of actual delivery of the Determination. D.C. Official Code § 51-111(b). The time for filing may be extended for good cause or excusable neglect. *Id.* DOES mailed the

Determination on May 18, 2012. Exhibit 300. Claimant filed an appeal of the Determination on May 22, 2012. Exhibit 301. The appeal was filed timely and jurisdiction is established. D.C. Official Code § 51-111(b).

B. Separation from Employment

An unemployed individual who meets certain statutory eligibility requirements generally is qualified to receive unemployment benefits. D.C. Official Code § 51-109. There are several disqualifying exceptions. D.C. Official Code § 51-110. For example, if an employee is discharged for "misconduct," as that term is defined by law, the employee is disqualified from receiving benefits for a period of time. D.C. Official Code § 51-110(b); 7 District of Columbia Municipal Regulations ("DCMR") 312. The burden is on the employer to prove disqualifying misconduct, by a preponderance of the evidence (*i.e.*, "more likely than not"), for an employee who otherwise would be eligible for unemployment benefits under D.C. Official Code §51-109. OAH Rule 2822.2 (burden of production on party arguing an exception to a statutory requirement); *Larry v. Nat'l Rehab. Hosp.*, 973 A.2d 180, 182 (D.C. 2009) (misconduct); *Morris v. U.S. EPA*, 975 A.2d 176, 181 (D.C. 2009) (burden of proof is preponderance of evidence).

There are two types of disqualifying misconduct, "gross" and "conduct other than gross." D.C. Official Code § 51-110(b) (1) and (2). "Gross misconduct" is defined as any act that "deliberately or willfully violates the employer's rules, deliberately or willfully threatens or violates the employer's interests; shows a repeated disregard for the employee's obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee." 7 DCMR 312.3.

Employees can also be disqualified from receiving unemployment benefits for conduct that is less egregious than gross misconduct but nevertheless "constitutes breach of the

employee's duties or obligations to the employer, a breach of the employment agreement or contract, or…adversely affects a material employer interest." 7 DCMR 312.5. The period for disqualification from receiving unemployment benefits is shorter for simple misconduct than for gross misconduct. *Compare* D.C. Official Code § 51-110(b) (2) *with* D.C. Official Code § 51-110(b) (1); *see Odeniran v. Hanley Wood*, 985 A.2d 421 (D.C. 2009) (explaining distinction between gross and simple misconduct). Both levels of misconduct require a finding that "the employee *intentionally* disregarded the employer's expectations for performance." *Bowman-Cook v. Washington Metro. Area Transit Auth.*, 16 A.3d 130, 135 (D.C. 2011) (emphasis in original.)

A violation of Employers rules or policies "does not constitute 'misconduct' per se." *Williams v. District Unemployment Comp. Bd.*, 383 A.2d 345, 349 (D.C. 1978). When an employer asserts that an employee committed misconduct due to negligence, there must be a showing of more than simple or ordinary negligence. *Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 27 (D.C. 2011). This type of aggravated negligence is also referred to as gross negligence or conduct involving a "reckless disregard" of consequences. *Id*. at 28. Negligence may constitute misconduct when it involves "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." *Id*. (citing *District of Columbia v. Walker*, 689 A.2d 44-45 (D.C. 1997)).

An employee who has been discharged cannot be disqualified from receiving benefits, unless there has been a finding of misconduct "based fundamentally on the reasons specified by the employer for the discharge." *See* Chase, 804 A.2d at 1123. In this case, Employer fired Claimant for his involvement in four preventable accidents within a 365 day period. Exhibit 201.

The facts were not disputed at the hearing. Employer's witness, B.C., presented no evidence that Claimant intentionally caused the four accidents. Employer's argument that Claimant's conduct was "recklessly indifferent to consequences" was unpersuasive in great part because it was entirely circular. Employer offered no support for the conclusion that Claimant's behavior was recklessly indifferent other than the mere fact that Claimant was involved in four accidents within a 365-day period. Employer provided no evidence that Claimant's behavior during any of the accidents constituted "an extreme departure from ordinary care" under the circumstances. *Capital Entm't Servs.*, 25 A.3d at 27.

I therefore conclude that Employer proved at most poor job performance. The District of Columbia Court of Appeals has held that "[w]hile unsatisfactory work performance may amount to 'misconduct' in some instances, implicit in this court's definition of 'misconduct' is that the employee intentionally disregarded the employer's expectations for performance." *Washington Times v. Dep't of Emp't Servs.*, 724 A.2d 1212, 1217-1218 (D.C. 1999). Finding that Claimant's unsatisfactory work performance was unintentional, I conclude that Employer failed to establish disqualifying misconduct. *Bowman-Cook,* 16 A.3d at 135.

In order to disqualify a claimant from receiving benefits, it is not sufficient that the discharge appear reasonable from Employer's perspective. *See Williams*, 383 A.2d at 349. Rather, the statute must be construed liberally to accomplish the legislative objective of minimizing the economic burden of unemployment. *Green v. D.C. Dep't of Emp't Servs.*, 499 A.2d 870, 875 (D.C. 1985). While the Claimant's accident record may justify Claimant's termination as Bus Operator, the same evidence, in context, is insufficient to support a finding of disqualifying misconduct as defined in the statute. D.C. Official Code §51-110(b)(1) and (2).

I reverse the Determination. Finding no disqualifying misconduct, Claimant is qualified to receive unemployment compensation. D.C. Official Code §§51-109, 110.

IV. ORDER

Based on the above findings of fact and conclusions of law, it is, this 14th day of June, 2012:

ORDERED, that the Determination is **REVERSED**; it is further

ORDERED, that the Claimant A.B., is **QUALIFIED** to receive unemployment compensation benefits; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Order are stated below.

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Arabella W. Teal
Administrative Law Judge